115-67

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 265.

HENRY EHRHARDT, PLAINTIFF IN ERROR,

vs.

MANERVA HOGABOOM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 15, 1882.

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	2	1
Bond	3	2
Transcript from superior court	6	3
Amended complaint	6	3
Answer	8	4
Judgment	8	4
Notice of motion for new trial	10	5
Order overruling motion for new trial	10	5
Bill of exceptions	11	5
Patent to Elkanah Baldwin, June 4, 1875	11	5
Testimony of John Prentice	13	6
Prentice's plat	14[1]	7
Township plat	14[2]	7
County surveyors report	15	7
Testimony of A. G. Winn	20	10
Defendant's requests as to charge	22	10
Charge of the court	23	11
Exceptions to charge	24	11
Notice of appeal	26	12
Stipulation as to correctness of transcript	27	13
Argument and submission	28	13
Opinion	29	13
Judgment	34	15
Clerk's certificate	35	15

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Writ of Error.* 33.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Henry Ehrhardt, appellant, and Manerva Hogaboom, respondent, a manifest error hath happened, to the great damage of the said Henry Ehrhardt, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington, District of Columbia, on the second Monday of October, 1882, next, in the said Supreme Court of the United States, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court District of California.

The above writ of error is hereby allowed.
R. F. MORRISON,
Chief Justice.

[Endorsed:] 7691. United States Supreme Court. Henry Ehrhardt, plaintiff in error, *vs.* Manerva Hogaboom, defendant in error. Writ of error. Filed Sept. 16, '81. Frank W. Gross, clerk, by C. Harlan, deputy.

2 UNITED STATES OF AMERICA, *ss:*

To Manerva Hogaboom, def't in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the 2d Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Henry Ehrhardt is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the

United States, this 28th day of September, A. D. 1881, and of the Independence of the United States the 106th.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

A copy of the foregoing was served on us the 29th day of September, 1881.

FREEMAN & BATES,
Attorneys for Defendant in the State Courts.

[Endorsed:] 7691. United States. Henry Ehrhardt, pl'ff in error, *vs.* Manerva Hogaboom, def't in error. Citation. Service of the within citation admitted September 29, 1881. Att'ys for def'ts in error. Filed Oct. 4, 1881. F. W. Gross, clerk, by C. Harlan deputy.

3 In the Supreme Court of the State of California.

MANERVA HOGOBOOM, Def't in Error,
vs.
HENRY EHRHARDT, Pl'ff in Error.

Know all men by these presents, that *that* we, Henry Schulmier and C. Wells, are held and firmly bound unto Manerva Hogoboom, in the just and full sum of five hundred dollars, to be paid to the said Manerva Hogoboom, her heirs, executors, administrators, and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated September 27th, 1881.

Whereas lately at a term of said supreme court, in an action depending therein on appeal, wherein Manerva Hogoboom, the said defendant in error was plaintiff and respondent and the said Henry Ehrhardt was defendant and appellant, a judgment was rendered in favor of said Manerva and against said Henry, for $5
4 damages, $51.80 costs, and for possession of certain real estate in said judgment described; and

Whereas the chief justice of said court, on the 17th day of September, 1881, made an order in said case, fixing the sum of $500 as the amount of the penalty in a bond to stay execution of said judgment on a writ of error sued out in said case; and

Whereas the plaintiff in error has lodged a copy of said writ of error with the clerk of said supreme court of said State for said defendant in error, and has served on him a citation admonishing her to be and appear at a session of the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1882:

Now the condition of the above obligation is such that, if the said plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages if the said Ehrhardt fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

C. WELLS.
H. SCHULMYER.

5 STATE OF CALIFORNIA, *County of Sacramento:*

Henry Schulmier and C. Wells, being duly sworn, each for himself, says he is a resident and freeholder in said county, and is worth five hundred dollars over and above all just debts and liabilities, exclusive of property exempt from execution.

C. WELLS.
H. SCHULMYER.

Subscribed and sworn to before me, this 3rd day of October, 1881.
[SEAL.] JOHN F. CAREY,
Notary Public.

(Endorsed:) Filed Oct. 4, '81. F. W. Gross, clerk, by Harlan, deputy.

6 *Amended Complaint.*

In the Supreme Court of the State of California. In the Superior Court of Sacramento County, State of California.

MANERVA HOGABOOM, Plaintiff,
vs.
HENRY EHRHARDT, Defendant. } No. ——

Plaintiff complaining, avers:

I.

That she is the owner and entitled to the possession of the north-east one-fourth of section six, in township five north, range five east, of Mount Diablo base and meridian, in said county and State, containing one hundred and eighty-one and thirty-one hundredths acres of land, and that the value of the use and occupa-
7 tion of said land is one dollar per acre per annum.

II.

That on the 7th day of April, 1880, while the plaintiff was so the owner, and entitled to the possession of said land, the defendant entered upon said land and ousted and ejected plaintiff therefrom, and has ever since withheld, and yet withholds, the possession thereof from plaintiff without any right thereto.

Wherefore plaintiff prays judgment against defendant for the restitution and possession of said land, and that the defendant be adjudged to have no title, estate, or interest in said land, and that plaintiff recover of defendant one dollar per acre per annum for the use and occupation of said land, and her costs of suit herein expended, and such other and further relief as may be proper in the premises.

FREEMAN & BATES,
Attorneys for Plaintiff.

Complaint filed April 8th, 1880.

THOS. H. BERKEY, *Clerk.*

8 *Answer.*

Title of Court and Cause.

The defendant answers and denies all and singular the allegations in the plaintiff's amended complaint contained.

Wherefore he demands judgment for his costs

J. H. McKUNE,
Attorney for Defendant.

Filed April 16th, 1880.

T. H. BERKEY, *Clerk.*

Judgment.

Title of Court and Cause.

SEPTEMBER 28TH, 1880.

On this 28th day of September, 1880, this cause having been regularly called for trial by a jury of twelve good and lawful citizens of the United States, who were duly empaneled, accepted, and sworn to try the cause, and the said jury having heard the evidence adduced at the trial of said case, and the court having instructed said jury herein, and the jury after due deliberation returned the following verdict, viz:

"We, the jury in the above-entitled cause, find in favor of the plaintiff for so much of the land described in the complaint
9 as lies south of the fence which divides the present possessions of plaintiff and defendant, and we assess her damages for the use and occupation thereof at the sum of five dollars.

A. S. HOPKINS, *Foreman.*"

It was thereupon ordered by the court that judgment be entered herein in accordance with said verdict.

It is therefore considered, ordered, and adjudged by the court here that the plaintiff, Manerva Hogaboom, do have and recover of and from the defendant, Henry Ehrhardt, the possession of so much of the northeast one-fourth of section six, in township five north, range five east, Mount Diablo base and meridian, situate and being in Sacramento county, California, as lies south of the fence which divides the present possession of plaintiff and defendant; and it is further ordered and adjudged by the court here that said plaintiff do have and recover of and from said defendant the sum of five dollars, as damages for the use and occupation of said land, and that plaintiff do also have and recover of from defendant her costs of suit, taxed at fifty-one dollars and eighty cents, together with all accruing costs.

Attest: A true copy.

THOS. H. BERKEY, *Clerk.*

Filed September 28, 1880.

THOS. H. BERKEY, *Clerk.*

10 *Notice of Motion for New Trial.*

Title of Court and Cause.

To Messrs. FREEMAN & BATES, *Attorneys for Plaintiff:*

Take notice that defendant intends to move the court to set aside the verdict and judgment rendered and entered in said case, and to grant him a new trial on the following ground:

I.

For error in law occuring at the trial and excepted to by defendant.

Respectfully, J. H. McKUNE,
For Defendant.

Order.

Title of Court and Cause.

This case coming on this day for hearing, on motion of defendant for a new trial herein, and all and singular the premises having been duly considered, I order that the said motion be, and the same is hereby, overruled and denied.

S. C. DENSON,
Superior Judge.

Filed January 31st, 1881.

T. H. BERKEY, *Clerk.*

11 *Bill of Exceptions.*

Title of Court and Cause.

Be it remembered that this case came on to be heard before said court on the 27th day of September, 1880, before the court and a jury.

The plaintiff, to make out her case, offered in evidence a patent from the Government of the United States to Elkanah Baldwin, dated June 4th, 1875.

The defendant objected, that it did not appear that the land therein described was the same land described in the complaint.

The court overruled the objection, and admitted the said patent in evidence, and the defendant then and there duly excepted.

Plaintiff thereupon read the patent to the jury, in words and figures as follows:

Certificate No. 5881.

United States of America to all whom these presents shall come, Greeting:

Whereas Elkanah Baldwin, of Sacramento county, California, has deposited in the General Land Office of the United States a certificate of the register of the land office at Stockton, California, whereby it appears that full payment has been made by the said Elkanah Baldwin according to the provisions of the act of Congess

of the 24th of April, 1820, entitled "An act making further
12 provision for the sale of public lands," for the lots numbered one and two and the south half of the fractional northeast quarter of section six, in township five north, of range five east, in the district of lands subject to sale at Stockton, California, containing one hundred and eighty-one acres and thirty-one hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Elkanah Baldwin. Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Elkanah Baldwin, and to his heirs, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereto belonging, unto the said Elkanah Baldwin, and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor
13 of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the tenth day ot June, in the year of our Lord one thousand eight hundred and seventy-five, and of the independence of the United States the ninety-ninth.

By the President: U. S. GRANT,
By S. D. WILLIAMSON,
Secretary.

Recorded, vol. II, page 170.

W. LIPPINCOTT,
Recorder of the General Land Office.

Plaintiff thereupon read in evidence a deed from J. H. Hogaboom and Elkanah Baldwin to plaintiff, dated March 24th, 1880. The deed was in due form, properly executed, and described the land by the same words of description contained in the patent.

JOHN PRENTICE, sworn in behalf of plaintiff, testified as follows:

14 I am a surveyor, and have been one for more than thirty years last past. I am acquainted with the lands in controversy and with the Government surveys thereof. The section lines in township five north, range five east, in this county, were not surveyed out until 1869 or 1870. The northeast quarter of section six

as surveyed by the United States contains 178 acres. On the east side it is forty-seven and ten-hundredths chains in length, and on the west side forty-theee and fifty-five hundredths chains. I have surveyed the northeast quarter section six, and have made a plat of my survey. On the plat the point marked "old mound in road," represents the northeast corner section six; the line marked "old fence," represents the fence running in an easterly and westerly direction, and dividing the present possessions of plaintiff and defendant.

The plat of the survey made by the witness was offered and received in evidence, and was in the lines, words, and figures following, to wit, the plat annexed marked "A."

(Here follows diagram, marked page 14[1].)

And the plaintiff also offered and the court admitted in evidence the approved township plat of said township in the lines, words, and figures following, the annexed township plat.

(Here follows diagram, marked p. 14[2].)

15 The defendant thereupon admitted that he was, at the date of the commencement of this action and at date of said deed, in possession of twenty acres of the land described in said patent lying south of a certain fence; and that the land he so held in possession was of the rental value of fifty cents per acre from the date of said deed to the time of the trial.

The plaintiff thereupon rested her case.

The defendant moved for a nonsuit, stating as the grounds thereof that it did not appear that the twenty acres lying south of said fence was within the northeast quarter of said section six, and that it was incumbent on plaintiff to show that the land sued for was, at the date of and previous to the issuance of said patent, subject to sale or disposition by the United States.

The court overruled the motion, and the defendant excepted.

The plaintiff thereupon offered and the court received in evidence the papers on file in the office of the surveyor general of the State of California, constituting swamp land survey number three hundred and sixty-seven, of the county of Sacramento, which, together with the indorsements thereon, are in words and figures following:

COUNTY SURVEYOR'S OFFICE, SACRAMENTO COUNTY, CAL.

Swamp and overflowed lands. Survey No. 367, township 5
16 north, range 5 east, section No. 3, the southeast quarter, base and meridian of Mount Diablo, containing 160 acres. Surveyed August 31st 1859, for Juan de Dios Y. Basenta.

Field notes.—Beginning at the southeast corner of section No. 6; thence north with section line 40 chs.; thence west 40 chs. to the center of section No. 6; thence south 40 chs. to section line; thence east 40 chs. to the place of beginning. Run by the true meridian,

magnetic variation 15° 30′ east. Surveyed in accordance with the act of the legislature concerning swamp and overflowed lands, approved April 18th, 1859, and the instruction of the surveyor general.

JOHN G. CLEAL,
County Surveyor, Sacramento County.

JUAN DE DIOS Y. BASETA, of the county of Sacramento, being duly sworn, deposes and says: That he wishes to purchase, under the provisions of an act to provide for the sale and reclamation of the swamp and overflowed lands of this State, approved April 18th, 1859, a certain tract of swamp and overflowed land in said county, lying and situate in township 5 north, range 5 east, and being the S. E. quarter of section No. 6.

And that he has not entered any other tract under the provisions of this act, or under the provisions of an act passed April 28th,
17 1855, entitled "An act to provide for the sale of the swamp and overflowed lands belonging to this State," which, with the lands sought to be purchased, shall exceed six hundred and forty acres; and that he does not know of any legal or equitable claim other than his own to the said land, and that to the best of his knowledge and belief said tract was overflowed during the year 1850, and that, judging from the indications of overflow and the statements of others, that every forty-acre lot, or its equivalent legal subdivision, embraced in said survey, was the greater part swamp or swampy or subject to inundation at the planting, growing, or harvesting season, so as to endanger, injure, or destroy the crops, taking the average season for a reasonable number of years prior to 1850.

JUAN DE DIOS Y. BASETA.

Sworn and subscribed to before me, this 31st day of August, 1859, Sacramento county, California.

JOHN G. CLEAL,
County Surveyor, Sacramento County.

We, J. P. Folks and James Moore, of the county of Sacramento, being duly sworn, do depose and say: That we are well acquainted with the method of surveying and marking the public lands, and that we have made, in our proper persons, an examination of
18 the lands described in the accompanying field notes and plat, and that from said examination we have discovered and are well satisfied that every forty-acre lot, or its equivalent legal subdivision, embraced in said survey, is the greater part swamp or swampy or subject to inundation at the planting, growing, or harvesting season, so as to endanger, injure, or destroy the crops, taking the average season for a reasonable number of years as the rule of determination.

Witness our hands and seals, this 31st of August, 1859.

J. P. FOLKS.
JAMES MOORE.

Sworn and subscribed to before me, this 31st of August, 1859, Sacramento county, California.

JOHN G. CLEAL,
County Surveyor, Sacramento County.

Indorsed: Certificate issued. Swamp and overflowed lands, Sacramento county.

Indorsed: Survey No. 367. Township 5 north, range 5 east, section No. 6; the S. E. quarter. Dup. cert. June 10th, 1872. Containing 160 acres. Surveyed for Juan de Dios Y. Baseta by John G. Cleal, county surveyor. Rec'd and filed Sept. 1st, 1859. Approved Sept. 1st, 1859. H. A. Higby, surveyor general, by E. Twitchell, deputy.

19 The defendant thereupon offered, and the court received, in evidence a duplicate certificate of purchase, issued in the matter of said survey No. 367, which certificate is in words and figures as follows:

Certificate of Purchase.

No. 202.

STATE LAND OFFICE OF THE STATE OF CALIFORNIA,
SACRAMENTO, *10th day of June*, 1872.

It appearing from the report of the county treasurer that on the Sept. 23d, A. D. 1859, Juan de Dios Y. Baseta paid to the State of California the sum of forty-four $\frac{80}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance, for 160 acres of swamp and overflowed land, described as follows in survey No. 367, Sacramento county: The southeast quarter of section 6, in township No. 5 north, range No. 5 east, Mt. Diablo meridian: Now, therefore, be it known that the said Juan de Dios Y. Baseta, having made payment of said twenty per cent. and first year's interest for the above described tract of land, is the purchaser of the same, and after having in all other respects complied with the requirements of the laws providing for the sale of said lands, and on surrendering this certificate to the State of California,
20 and after the said lands have been confirmed to the State, the said Juan de Dios Y. Baseta, or his assigns, shall be entitled to receive a patent for the same.

Balance of purchase-money due, $128.

Interest computed from September 1st, 1859.

Original dated March 12th, 1860.

In witness whereof, the register of said land office has hereunto set his hand and affixed his seal of office, the day and date above mentioned.

ROBERT GARDNER,
Register of State Land Office.

JUNE 10th, 1872.

The tract books of my office show that payment in full has been made on this survey.

ROBERT GARDNER,
Register State Land Office.

The defendant thereupon produced as his witness A. G. WINN, who testified, as follows:

I have been a surveyor in this county for twenty-seven years last past. I made the original survey of said land described in said papers offered in evidence from the surveyor general's office, that is swamp land survey No. 367, of the county of Sacramento. I know
21 where the original stakes were set for that survey. Instead of surveying it from the north, connecting it with Government lines on the north side of township five north, range five east, it was surveyed from the south, connecting it with the surveys made for swamp lands in that vicinity, and this survey is uniform with all other swamp land surveys in that vicinity. The defendant is in possession of about three acres south of the fence running easterly and westerly across the land in dipute, and north of swamp land survey No. 367. All the rest of the land in dispute in possession of defendant is in swamp land survey No. 367, as made by me and returned to the office of the surveyor general.

The defendant thereupon offered to prove by the witness that all the land in possession of defendant at the time of the commencement of this action, and included in said patent was, on the 28th day of September, 1850, ever since has been, and still is swamp and overflowed land, made thereby unfit for cultivation, and as such was granted to the State of California by an act of Congress of that date.

The plaintiff objected: that such evidence is irrelevant, and that the issuance of said patent by the United States was conclusive against this defendant; that the force of the patent from the United States could not thus be destroyed, in a case where it did not
22 appear that the lands in controversy had ever been listed to the State, nor claimed or represented by it as swamp land on any of its maps or plats of segregation, and that the patenting of the lands, as public lands of the United States, is an adjudication that the lands are not swamp and conveys the legal title, and must therefore prevail here.

The court sustained said objection, and ruled out such testimony.

And the defendant then and there, by counsel, excepted.

The defendant introduced in evidence a deed from Juan de Dios Y. Baseta to defendant, dated August 17th, 1861, conveying his interest in the S. W. ¼ section 6, township 5 north, range 5 east, Mount Diablo base and meridian, and rested his case.

The defendant thereupon asked the court to instruct the jury as follows:

The papers constituting swamp land survey No. 367 of the

county of Sacramento are in evidence, and the defendant claims under that survey, made on application of Juan de Dios Y. Baseta.

The State of California, by its certificate of purchase, and on receipt of the entire purchase price, sold the land mentioned in the certificate of purchase, according to the lines as surveyed by
23 the county surveyor of said county. The State of California thereby selected the land included within said lines, in part satisfaction of the grant of swamp and overflowed lands made to the State by the act of Congress of September 28th, 1850, and if the State of California sold said lands to Baseta, and he purchased the same in good faith, prior to July 23d, 1866, under and in accordance with the laws of said State, section one of the act of Congress, passed July 23d, 1866, entitled An act to quiet land titles in California, confirmed said land to said State, according to the lines established for the State, and vested in it an interest in such lands so sold by it, which would inure to the benefit of the purchaser, whether the land was swamp or overflowed or not, and the interest so confirmed to the State would be superior to an interest derived by patent from the United States, to one who was not, on said 23d day of July, 1866, an adverse claimant.

The court refused to so instruct the jury, and defendant excepted.

The court thereupon instructed the jury as follows:

GENTLEMEN OF THE JURY: This case has been mostly disposed of by the law questions involved. The plaintiff has shown title to the land sued for, and is entitled to recover from the defendant so
24 much of the land in controversy as was patented by the United States Government to Elkanah Baldwin, and by Baldwin conveyed to her, and which was in the possession of the defendant at the time of the commencement of this action. You have heard the testimony of the witnesses—the engineers who made the surveys—as to about the amount. The plaintiff is also entitled to the value of the use and occupation of the land during the time it has been withheld from the plaintiff by the defendant, which is to date in April last, the time of the commencement of this suit; that is, she is entitled to the rents and profits of the land since April last, and up to the present time only. So your verdict will be in favor of the plaintiff for such portion of the land as the defendant held in possession. The question of possession is before you on submission, but on the trial it was agreed by the parties that the defendant was in possession, and you must determine how much, in order to determine how much the damage will be. I have written a formal verdict, but you are not bound by it, but I give it to you as an idea of what the verdict should be. This is merely to be used by you as a form. The jury will retire under charge of the officer.

Mr. McKune excepted to the instruction given.

The defendant will rely on his motion for a new trial and
25 on appeal on the following errors of law occurring at the trial, and excepted to by him:

I.

The court erred in admitting in evidence the said patent of the United States, as its description did not coincide with the description contained in the complaint.

II.

The court erred in overruling the motion for nonsuit.

III.

The court erred in sustaining the objection made by plaintiff to the admission in evidence of proof that the land in controversy was and is swamp and overflowed land, made thereby unfit for cultivation.

The court erred in refusing and giving its instruction.

A draft for bill of exceptions was served on Messrs. Freeman & Bates, attorneys for plaintiff, by the attorney for defendant, on the 5th October, 1880, and plaintiff's attorneys in due time served on defendant's attorney therein amendments thereto.

26 The foregoing bill of exceptions has been settled and allowed by me, and is correct.

January 31st, 1881.

S. C. DENSON,
Superior Judge.

Filed January 31st, 1881.

T. H. BERKEY, *Clerk*,
By J. H. PARNELL, *Deputy.*

Notice of Appeal.

Title of Court and Cause.

To the clerk of said court and to Messrs. Freeman & Bates, attorneys for plaintiff:

Take notice that the said defendant hereby appeals from and against the judgment entered in said case against him, and also from and against the order made in said case overruling his motion for a new trial, to the supreme court of said State.

Respectfully,
J. H. McKUNE,
Attorney for Defendant.

Indorsed: Filed February 1st, 1881. T. H. Berkey, clerk.

27 Also indorsed: Service of the within notice by copy admitted February 1st, 1881, and we hereby waive the filing of undertakings to support said appeals, and consent that the said appeals be considered perfected without filing any undertaking.

FREEMAN & BATES,
Attorneys for Plaintiff.

Stipulation.

Title of Court and Cause.

We hereby certify that the foregoing transcript is correct.

FREEMAN & BATES,
Att'ys for Plaintiff.
J. H. McKUNE,
Att'y for Def't.

28 In Supreme Court of State of California.

MANERVA HOGOBOOM, Respondent, *vs.* HENRY EHRHARDT, Appellant.

May 16, 1881. Argued and submitted.

29 *Department One. Filed August 4th*, 1881.

HOGABOOM *vs.* EHRHARDT. } No. 7691.

The plaintiff sued in ejectment to recover the northeast quarter of section six, township 5 north, range 5 east, of Mount Diablo base and meridian, containing 181 $\frac{30}{100}$ acres of land, alleging herself to be the owner in fee thereof.

The answer of the defendant consisted of a general denial only.

On the trial the plaintiff introduced a patent from the United States to one Baldwin, for lots numbered one and two, and the south half of the fractional northeast quarter of said section 6, and a deed for the same premises from Baldwin to the plaintiff.

Thereupon the defendant admitted his possession of twenty acres of the land described in said patent lying south of a certain fence, for the possession of which twenty acres the plaintiff recovered a verdict and judgment.

On both sides it is conceded that the land in question was originally public land of the United States, and it is not denied on
30 the part of the defendant that the patent issued by the Government to the plaintiff's grantor was regular in form. His contention is that the twenty acres included in the patent, of which he has possession, was swamp and overflowed land, and, therefore, passed to the State of California by virtue of the act of Congress of September 28, 1850, and that he, through mesne conveyances, has a certificate of purchase, from the register of the State land office for the southeast quarter of the said section 6, the lines of which quarter, he claims, were so run by the county surveyor of Sacramento county (where the lands are situated), as to include the twenty acres in dispute, but the lines were so run, not in conformity but in conflict with, the United States surveys.

The first alleged error grows out of the circumstance that, on the trial, the defendant offered to prove by parol that the twenty acres possessed by him, and included within the plaintiff's patent, "was, on the 28th day of September, 1850, ever since has been, and still is,

swamp and overflowed land, made thereby unfit for cultiva-
31 tion," and was therefore granted to the State by virtue of the swamp land grant of the date mentioned.

This offer was rejected by the court upon objections interposed by the plaintiff.

The action of the court in that respect is clearly sustainable on the ground that the defendant did not offer to prove that the greater part of any legal subdivision was wet and unfit for cultivation, and therefore swamp and overflowed land within the terms and meaning of the act of Congress, but only that the twenty acres of which he held possession was of that character. Unless the twenty acres constituted the greater part of a legal subdivision, according to the Congressional system of surveys, they were not swamp and overflowed lands within the terms and meaning of the act of Congress. (See the act, U. S. Stat., vol. 9, p. 519; also Robinson *vs.* Forrest, 29 Cal., 323.) It is not necessary, therefore, to determine the other points made by counsel respecting this ruling of the court.

The only other alleged error is the refusal of the court below to give the following instruction to the jury, asked for by the defendant:

"The papers constituting swamp land survey No. 367 of
32 the county of Sacramento are in evidence, and the defendant claims under that survey, made on application of Juan de Dios y Baseta.

"The State of California, by its certificate of purchase, and on the receipt of the entire purchase price, sold the land mentioned in the certificate of purchase according to the lines as surveyed by the county surveyor of said county. The State of California thereby selected the land included within said lines, in part satisfaction of the grant of swamp and overflowed lands made to the State by the act of Congress of September 28, 1850, and if the State of California sold said land to Baseta, and he purchased the same in good faith, prior to July 23, 1866, under and in accordance with the laws of said State, section one of the act of Congress, passed July 23, 1866, entitled an act to quiet land titles in California, confirmed said land to said State according to the lines established for the State, and vested in it an interest in such land so sold by it, which would en-
ure to the benefit of the purchaser, whether the land was
33 swamp, or overflowed, or not, and the interest so confirmed to the State would be superior to an interest derived by patent from the United States to one who was not, on the said 23rd day of July, 1866, an adverse claimant."

The court was right in so refusing. The land described in the survey of the county surveyor, and in the certificate issued by the register of the State land office, was the southeast quarter of section 6, whereas the land in controversy forms part of the northeast quarter of that section. Nowhere does it appear that the land in question was ever listed to the State, or selected or claimed by the State. Under such circumstances the State cannot be said to have sold it in good faith or otherwise. Assuming, therefore, without deciding or intimating that the first section of the act of Congress, approved

July 23, 1866, has any application to swamp and overflowed lands, the appellant can derive no benefit from it as his case comes here.

Judgment and order affirmed.

ROSS, *J.*

We concur. McKINSTRY, *J.*
McKEE, *J.*

34 *Department One.*

In the Supreme Court of the State of California.

MANERVA HOGABOOM, Respondent,
vs.
HENRY EHRHARDT, Appellant. } No. 7691.

On appeal from the superior court in and for the county of Sacramento.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Ross, J.

We concur. McKINSTRY, *J.*
McKEE, *J.*

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Sacramento in the above-entitled cause be, and the same is hereby, affirmed, with costs.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 4th day of August, A. D. 1881, and now remaining of record in my office.

Witnes my hand and the seal of the court, affixed at my office, this 22d day of August, A. D. 1882.

[SEAL.] F. W. GROSS, *Clerk,*
By J. B. MARTIN, *Deputy.*

[Endorsed:] No. 7691. In the supreme court, State of California. Certified copy of judgment. Hogaboom *vs.* Ehrhardt.

35 STATE OF CALIFORNIA, *County of Sacramento:*

I, Frank W. Gross, clerk of the supreme court of the State of California, hereby return the annexed writ of error to the Supreme Court of the United States, and certify that the foregoing and annexed pages, numbered from one to thirty-four, inclusive, constitute and contain a true copy of the record and of all proceedings in the case of Manerva Hogoboom against Henry Ehrhardt, and that on 17th day of September, 1881, the said plaintiff in error lodged in my office a copy of the said writ of error for the defendant in error.

[SEAL.] F. W. GROSS, *Clerk,*
By C. N. POST, *Deputy.*

Endorsed on cover: California supreme court. No. 265. Henry Ehrhardt, plaintiff in error, *vs.* Manerva Hogaboom. Filed 15th September, 1882.

115-67

In the Supreme Court of the United States.

HENRY EHRHARDT, PLAINTIFF IN ERROR,

vs.

MANERVA HOGABOON, DEFENDANT IN ERROR.

Ejectment for land in Sacramento County, Cal. Plaintiff claims under U. S. patent; defendant under State selection, as swamp and overflowed land, and by virtue of the Act passed July 23d, 1866, confirming that selection. The judgment was for a tract of land enclosed within the patent and State selection.

The principal question of law raised by the record is, did the first section of the Act of 23d July, 1866 (14 Stat., p. 218), confirm the State location so that the patent to Elkanoa Baldwin did not pass title to so much of the land described in it as was within the State location?

The language of the confirmatory Act is, "That in all cases when the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any Act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be and hereby are all confirmed to said State."

The State of California made its selections of swamp and overflowed land granted to it by Acts of Congress, under several Acts to be found in its Statutes: 1855, p. 189; 1858, p. 198; 1859, p. 340, 180; 1860, p. 28; 1861, p. 6, 140; 1861, p. 251, 355; 1862, p. 197; 1863, p. 523; 1862, p. 238; 1862, p. 476; 1863, p. 141, 684; 1864, p. 287, 472; 1868, p. 507; and Political Code.

The case presented on the part of plaintiff in error satisfies all the requirements of the section quoted. The State selected the *locus in quo* and disposed of it to the grantor of plaintiff in good faith under its laws; but inasmuch as the State had, in some cases, selected swamp and overflow lands, either not swampy or in which the character of the land was in dispute, provision was further made in section four of the Act to meet certain contingencies, but this in no way conflicts with the provisions of section one. If section one was not intended to cover and confirm selection of swamp land, there would have been some words indicating that swamp and overflowed lands were not by it confirmed to the purchaser.

The plaintiff in error submits his case on the above brief.

J. H. McKUNE,
Att'y for Plaintiff in Error.